THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL ROBINSON, Appellant.	No. 36918-4-II UNPUBLISHED OPINION

Penoyar, A.C.J. — A jury convicted Michael Robinson of residential burglary, theft of a firearm, first degree unlawful possession of a firearm, first degree theft, and unlawful possession of methamphetamine while armed with a firearm. Robinson now appeals, arguing that (1) the trial court erred by denying his motion for mistrial; (2) he was denied effective assistance of counsel; (3) sufficient evidence does not support his unlawful possession of methamphetamine while armed with a firearm conviction; (4) the trial court violated double jeopardy by entering judgments against him for theft of a firearm and first degree theft; and (5) the trial court erred by calculating his theft of a firearm and first degree theft convictions as separate offenses. In a statement of additional grounds (SAG),[1] Robinson raises nine additional claims, which we discuss below. Because insufficient evidence supports Robinson's unlawful possession of methamphetamine while armed with a firearm conviction, we reverse that conviction and remand for resentencing. We affirm Robinson's remaining convictions.

[1] RAP 10.10.

FACTS

On July 10, 2007, an unidentified person burglarized Chad Yantis's and Megan Moskwa's residence. Stolen property included a safe containing a firearm, magazines, and a gun cleaning kit, as well as an iPod, two digital cameras, a radio, a cellular phone, a backpack, some keys, and several personal checkbooks. The following day, Washington State Patrol Trooper Tony Doughty arrested Daniel Smith after a high speed chase involving a vehicle in which Smith was the driver and Robinson was the sole passenger.

During a search incident to arrest, Doughty discovered a cell phone box directly behind the vehicle's passenger seat. In the box, Doughty found a fully loaded handgun wrapped in cloth, some money, and a garage door opener. Behind the driver's seat, he found a backpack containing a gun cleaning kit, several different types of keys, and multiple checkbooks with different people's names on them. A subsequent check of the firearm revealed that its serial number matched that of the firearm stolen from Yantis's and Moskwa's home. Doughty advised Robinson that he was being placed in custody for possession of stolen property and read him his *Miranda*[2] warnings.

At trial, there was conflicting testimony as to the events that followed. Detective Doug Clevenger testified that, upon his arrival at the scene, he observed Robinson and believed that he might be under the influence of methamphetamine.[3] After Clevenger and Doughty searched the vehicle further, they discovered a pair of pants that contained a cellular phone, a glass smoking device "for methamphetamine," keys, and two checkbooks. Report of Proceedings (RP) (Oct. 15

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] Robinson later admitted to smoking methamphetamine and marijuana with Smith earlier that day.

& 16, 2007) at 128. The pants also contained currency that Clevenger believed to be counterfeit. They also found a hat, a baseball bat, and tools. Robinson claimed ownership of the hat, pants, and cellular phone, but he denied owning the other items.

Clevenger also testified that when he asked Robinson whether he was with Smith during the burglary, Robinson responded affirmatively and explained that the burglary occurred the day before. When Clevenger asked what he had taken from the home, Robinson listed a gun, an iPod, some checkbooks, a safe, and a radio. He then offered to help the detective get the safe back, as he "knew where [it] was." RP (Oct. 15 & 16, 2007) at 155. Additionally, Robinson admitted to having handled the gun at one point. When Clevenger informed Robinson that he was going to have a drug dog search the vehicle and asked whether he had knowledge of anything that might threaten the dog's safety, Robinson "got a little bit uncomfortable." RP (Oct. 15 & 16, 2007) at 157. He informed Clevenger that Smith was "a cook," and, when Clevenger requested clarification, he explained that Smith had expressed concern about a methamphetamine lab in the trunk when Doughty pulled them over. RP (Oct. 15 & 16, 2007) at 157.

Detective Brenda Anderson also testified that, at the patrol station, Robinson told her that he and Smith had broken into and taken property from a house "on the west side." RP (Oct. 15 & 16, 2007) at 225. He indicated to her that he had taken a small, portable safe that contained a gun and a backpack, and that authorities later found the gun during their search of the vehicle. He also indicated that the pants and cellular phone the officers obtained belonged to him. Robinson explained to Anderson that Smith had promised him $50 or $60 to assist him with the burglary, but he had not received the money.

The following day, on July 12, Clevenger requested and obtained a warrant to search the vehicle's trunk. On July 13, officers conducted the search and found items consistent with the manufacture of methamphetamine. The items later tested positive for methamphetamine. They also found printer paper bearing counterfeit United States currency.

The State charged Robinson by second amended information with first degree burglary while armed with a firearm (count I), theft of a firearm (count II), first degree unlawful possession of a firearm (count III),[4] first degree theft (count IV), and unlawful manufacture of methamphetamine while armed with a firearm (count V). The State subsequently amended the unlawful manufacture of methamphetamine charge to unlawful possession of methamphetamine while armed with a firearm. Neither party requested, nor did the trial court hold, a CrR 3.5 or a CrR 3.6 hearing before trial. The day before trial, defense counsel moved to withdraw from representation, citing "a serious breakdown in the attorney/client relationship." RP (Oct. 12, 2007) at 4. The trial court denied his motion.

At trial, Robinson testified on his own behalf. He denied any involvement in the burglary, claiming that he had spent the day with his family. He denied admitting to Clevenger and Anderson that he had participated in the burglary or that he had handled the firearm. He also denied possessing the stolen items or owning items found in the vehicle. He claimed that his cellular phone, which the officers found in the vehicle, had been stolen.

During the State's closing argument, the prosecutor stated:

> And then we get to the alibi. Well, I wasn't even around. I was with -- I wrote it down. I think he named five different people, including his mother, that he was with on July 10th. Now, the way you prove something in court is you get

[4] Robinson stipulated to pleading guilty to second degree burglary in 2006.

someone to come in here, sit on that witness stand, swear to tell the truth, and --

RP (Oct. 17 & 18, 2007) at 334. Defense counsel objected, stating, "The defense has no burden to prove anything in this case." RP (Oct. 17 & 18, 2007) at 334. The trial court sustained his objection, reminding jurors, "[R]emember the evidence. What counsel both say is not evidence." RP (Oct. 17 & 18, 2007) at 334. The prosecutor then continued:

> There's an instruction you may consider the lack of evidence. Well, did anyone get up here and support what Mr. Robinson said, that story? Of all those people that he was allegedly with on July 10th, did you see anyone get up here and support that? You didn't, and that speaks volumes.

RP (Oct. 17 & 18, 2007) at 334-35.

After the State rested its case, defense counsel moved for a mistrial, arguing that the prosecutor's comments unconstitutionally shifted the burden of proof to the defendant. Alternatively, defense counsel requested a curative instruction to remind the jury that the defendant has no duty to prove anything beyond a reasonable doubt. The trial court denied the motion, but gave the following instruction:

> Ladies and gentlemen, what counsel say in their closing argument is . . . not evidence. Please disregard any remark, statement, or argument which is not supported by the evidence or the law as given to you by me. The law requires the state to meet its burden beyond a reasonable doubt. The burden never shifts to the defense.

RP (Oct. 17 & 18, 2007) at 344.

The jury convicted Robinson on counts II through V. On count I, the jury found Robinson guilty of the lesser crime of residential burglary. The trial court calculated his offender score, in part, by treating his theft of a firearm and first degree theft convictions as separate offenses; it then sentenced Robinson within the standard range, upon the parties' agreement.

Robinson now appeals.

ANALYSIS

I. Motion for Mistral

Robinson argues that the prosecutor's comments during closing argument implied that he had a duty to present exculpatory evidence. Furthermore, he contends, the trial court's limiting instruction did not strike the statements or direct the jury to disregard the statements. Therefore, he reasons, the trial court abused its discretion by denying his motion for mistrial. Citing *State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991), the State responds that the prosecutor's comments did not impermissibly imply that Robinson had a duty to call witnesses. Furthermore, it argues, the trial court "more than adequately" instructed the jury regarding the State's burden of proof. Resp't's Br. at 7.

"The trial court is invested with broad discretion in granting motions for a new trial, and the trial court's determination will not be disturbed on appeal absent an abuse of discretion." *State v. Marks*, 71 Wn.2d 295, 302, 427 P.2d 1008 (1967). A reviewing court will find abuse of discretion only when no reasonable court would have reached the same conclusion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). A trial court's denial of a motion for mistrial will only be overturned only when there is a substantial likelihood that the error prompting the request for a mistrial affected the jury's verdict. *Rodriguez*, 146 Wn.2d at 269-70.

The present case is nearly indistinguishable from the Washington Supreme Court's decision in *Blair*. In that case, Blair was arrested and charged with one count of possession of cocaine and one count of unlawful delivery of a controlled substance. *Blair*, 117 Wn.2d at 482.

During trial, a prosecution witness described sheets of paper found in his room as "crib" notes or sheets, "of a kind commonly found at locations where drugs are sold" and "constituting a 'crude business ledger.'" *Blair*, 117 Wn.2d at 482. Some of the pieces of paper contained lists of people, with numbers written across from the names. Blair testified that most of the names and numbers represented personal loans and amounts owed to him from card games; however, he only called one of the people listed to testify at trial. *Blair*, 117 Wn.2d at 483.

During closing argument, the prosecutor referred to the slips of paper and noted that Blair had not called most of the people listed on them to testify at trial. *Blair*, 117 Wn.2d at 483. Defense counsel did not object, but he did tell the jury that Blair had no obligation to present any evidence. *Blair*, 117 Wn.2d at 484. In rebuttal, the prosecutor again noted that Blair had not called these witnesses to testify. *Blair*, 117 Wn.2d at 484.

On appeal, Blair challenged his conviction for unlawful delivery of controlled substance, arguing that the prosecutor committed reversible error by commenting on his failure to call particular witnesses. *Blair*, 117 Wn.2d at 481. Our Supreme Court disagreed, holding that the prosecutor's comments did not constitute error. *Blair*, 117 Wn.2d at 481. It explained that under the "missing witness" or "empty chair" doctrine, it has become a well established rule that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, the jury "may draw an inference that it would be unfavorable to him." *Blair*, 117 Wn.2d at 485-86 (quoting *State v. Davis*, 73 Wn.2d 271, 276, 438 P.2d 185 (1968)). It noted that Blair both testified at trial and put on a defense and held that under the circumstances of Blair's case, the missing witness doctrine applied

and therefore no error occurred.[5] *Blair*, 117 Wn.2d at 485-88. It also described when the doctrine applies: a prosecutor may comment on the defendant's failure to call a competent witness whose production is within the control of the defense, whose testimony would corroborate the defendant's testimony, and whose testimony is not privileged, self-incriminating, unimportant, or cumulative. *See Blair*, 117 Wn.2d at 488-90.

In this case, Robinson testified on his own behalf. He testified that he was with four family members and a sister's former boyfriend on the day in question. The defense did not, however, call any of them to testify and corroborate his story at trial. The record does not indicate why they did not appear as alibi witnesses. It does not indicate that the witnesses' testimony would have been privileged, self-incriminating, unimportant, or cumulative in this case. Thus, the prosecutor's comments were not improper. Moreover, the trial court properly instructed the jury that Robinson had no duty to call witnesses and that the burden never shifted to him. Robinson has thus failed to demonstrate that the trial court abused its discretion by denying his motion for mistrial.

II. Ineffective Assistance of Counsel

Robinson next argues that he was denied effective assistance of counsel because defense counsel failed to immediately object and move for a mistrial after the prosecutor's second statement. We disagree.

Effective assistance of counsel is guaranteed under the federal and state constitutions. *See* U.S. Const. amend. VI; Wash. Const. art. I, § 22. To prove ineffective assistance of counsel, the

[5] The court also distinguished *State v. Traweek*, 43 Wn. App. 99, 715 P.2d 1148 (1986), a case in which the defendant did not take the stand. *Blair*, 117 Wn.2d at 485.

appellant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If a defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as the basis for a claim that the defendant received ineffective assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *Pirtle*, 136 Wn.2d at 487. We give great judicial deference to trial counsel's performance and begin our analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

In this case, Robinson was not denied effective assistance of counsel. As previously mentioned, the prosecutor's comments were not improper. Therefore, defense counsel did not perform deficiently by failing to object or move for a mistrial immediately following the prosecutor's second comment.

III. Unlawful Possession of Methamphetamine While Armed with a Firearm

Robinson next argues that insufficient evidence supports his conviction for unlawful possession of methamphetamine while armed with a firearm. The State responds that sufficient evidence supports that Robinson was an accomplice to Smith in the possession of methamphetamine, that he constructively possessed methamphetamine, and that he was armed

with a firearm at the time he committed the crime. The State's arguments are unpersuasive.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd,* 95 Wn.2d 385, 622 P.2d 1240 (1980); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (en banc). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

RCW 69.50.4013(1) requires that the State prove that the defendant was in possession of a controlled substance. Possession may be actual or constructive. *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).

> Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.

State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969) (citing *State v. Walcott*, 72 Wn.2d 959, 435 P.2d 994 (1957)). Mere proximity is not enough to establish possession. *State v. Potts*, 93 Wn. App. 82, 88, 969 P.2d 494 (1998) (citing *State v. Robinson*, 79 Wn. App. 386, 391, 902

P.2d 652 (1995)). Various factors determine dominion and control, and the cumulative effect of a number of factors is a strong indication of constructive possession. *Partin*, 88 Wn.2d at 906. We look at all the evidence tending to establish circumstances from which the jury could reasonably infer the defendant had dominion and control of the drug to establish constructive possession. *See Partin*, 88 Wn.2d at 906. Showing dominion and control over the premises where the drugs are found is a means by which constructive possession of drugs is often established. *State v. Spruell*, 57 Wn. App. 383, 387, 788 P.2d 21 (1990).

Both parties focus on theories of constructive possession and accomplice liability.[6] Here, the methamphetamine lab was located in the vehicle's trunk. There is no evidence that Robinson ever accessed the trunk or that he had the means to do so. There is no evidence that Robinson had even passing control or momentarily handled the methamphetamine officers found in the trunk. That he admitted to using methamphetamine, claimed ownership of a pipe used to smoke methamphetamine, and told Clevenger that Smith expressed concern about the lab in the trunk, does not establish that Robinson constructively possessed the drugs in the trunk. That Robinson claimed ownership of items found in the vehicle or admitted to assisting Smith with the burglary also does not establish that he had dominion and control over the vehicle or the trunk's contents. Even viewed in a light most favorable to the State, this evidence could not support a finding beyond a reasonable doubt that Robinson possessed the methamphetamine found in the car; we therefore reverse his unlawful possession of methamphetamine while armed with a firearm

[6] The State briefly asserts that there was sufficient evidence to allow a rational trier of fact to find that Robinson was an accomplice to Smith in the possession of methamphetamine, as the jury "had a picture of a partnership between Robinson and Smith in committing crimes that . . . were the result of the two acting together." Resp't's Br. at 12. This argument is unpersuasive.

conviction.

IV. Double Jeopardy

Robinson next argues that his theft of a firearm and first degree theft convictions violate double jeopardy. The State responds that because the legislature has made it clear that these are two separate offenses, convictions for both do not violate double jeopardy. We agree.

Article I, section 9 of the Washington State Constitution provides the same protection against double jeopardy as the fifth amendment to the federal constitution. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). Both the state and federal double jeopardy clauses protect against multiple punishments for the same offense, as well as against a subsequent prosecution for the same offense after acquittal or conviction. *Orange*, 152 Wn.2d at 815 (citing *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995)). Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. *Orange*, 152 Wn.2d at 815 (citing *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)).

> To impose more than one punishment for conduct that violates more than one criminal statute is not necessarily a violation of double jeopardy. The fundamental question for purposes of double jeopardy analysis is whether the legislature intended that result.

State v. Cole, 117 Wn. App. 870, 875, 73 P.3d 411 (2003) (citing *Calle*, 125 Wn.2d at 776).

The State charged Robinson with theft of a firearm under RCW 9A.56.300. The statute provides:

> (1) A person is guilty of theft of a firearm if he or she commits a theft of any firearm. (2) This section applies regardless of the value of the firearm taken in the

> theft. (3) Each firearm taken in the theft under this section is a separate offense. (4) The definition of "theft" and the defense allowed against the prosecution for theft under RCW 9A.56.020 shall apply to the crime of theft of a firearm. (5) As used in this section, "firearm" means any firearm as defined in RCW 9.41.010. (6) Theft of a firearm is a class B felony.

RCW 9A.56.300. The State also charged Robinson with first degree theft under RCW 9A.56.030. The statute provides:

> (1) A person is guilty of theft in the first degree if he or she commits theft of:
> (a) Property or services which exceed(s) one thousand five hundred dollars in value *other than a firearm as defined in RCW 9.41.010*;
> (b) Property of any value, *other than a firearm as defined in RCW 9.41.010* or a motor vehicle, taken from the person of another; or
> (c) A search and rescue dog, as defined in RCW 9.91.175, while the search and rescue dog is on duty.
> (2) Theft in the first degree is a class B felony.

RCW 9A.56.030 (emphasis added).

The jury convicted him on both counts. Only if the relevant statutes do not make it clear whether the legislature intended one or two convictions, do we then turn to rules of statutory construction. *Cole*, 117 Wn. App. at 875. These statutes clearly demonstrate that the legislature intended separate punishments for theft of a firearm and first degree theft. The State could not have charged Robinson with taking the firearm under the first degree theft statute because it specifically excludes firearms. Further, the State could not have charged Robinson for stealing the other items under the theft of the firearm statute because it only applies to firearms. The legislature, which also provided that each firearm stolen constitutes a separate offense, clearly intended that theft of a firearm be treated as a separate and distinct offense from theft of other items.

Furthermore, Robinson's arguments regarding multiple convictions under the same statute

and the merger doctrine are misplaced. In this case, Robinson was convicted under two distinct statutes, RCW 9A.56.300 and RCW 9A.56.030. Moreover, the merger doctrine is a rule of statutory construction which only applies when the legislature has clearly indicated that in order to prove a particular degree of a crime, the State must prove not only that a defendant committed that crime but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes. *State v. Vladovic*, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). The merger doctrine does not apply to the aforementioned statutes, which clearly treat theft of a firearm and first degree theft as separate offenses.

V. Offender Score Calculation

Robinson next argues that the trial court erred by treating his theft of a firearm and first degree theft convictions as separate offenses for purposes of calculating his offender score. The State responds that Robinson waived this issue by failing to raise it below and by agreeing to the standard range the State submitted, "which he would have done only if he also agreed with the calculation of the offender score." Resp't's Br. at 25.

We review a sentencing court's offender score calculation de novo. *State v. Mitchell*, 81 Wn. App. 387, 390, 914 P.2d 771 (1996). RCW 9.94A.589(1)(a) requires multiple current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant's offender score. *State v. Tresenriter*, 101 Wn. App. 486, 496, 4 P.3d 145 (2000) (quoting *State v. Tili*, 139 Wn.2d 107, 118, 985 P.2d 365 (1999)) (citing former statute). As used in this subsection, the phrase "same criminal conduct" is defined as two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same

victim. RCW 9.94A.589(1)(a). Although a defendant cannot generally waive a challenge to a miscalculated offender score, there can be a waiver where "the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Application of the same criminal conduct statute involves both factual determinations and the exercise of discretion. *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000).

In *Nitsch*, the defendant pleaded guilty to first degree burglary and first degree assault. 100 Wn. App. at 513. The parties agreed to the standard range calculation, and the trial court sentenced Nitsch to the high end of the standard range on both counts, to run concurrently. *Nitsch*, 100 Wn. App. at 513-14. The trial court also imposed two firearm enhancements, to run consecutively to each other. For the first time on appeal, Nitsch argued that his offender score was erroneously calculated because the trial court failed to determine whether the burglary and assault constituted the same criminal conduct. *Nitsch*, 100 Wn. App. at 514. Division One of this court held that Nitsch waived review of this issue when he agreed to the standard range calculation. Furthermore, it held that even if Nitsch had preserved the issue for review, no error occurred. *Nitsch*, 100 Wn. App. at 514.

In *Nitsch*, the defendant filed a presentence report in which he affirmatively asserted his standard range. 100 Wn. App. at 522. Because his range could "be arrived at only by calculating [his] score," the court held that his explicit statement of the range was "inescapably an implicit assertion of his score, and also an implicit assertion that his crimes did not constitute the same criminal conduct." *Nitsch*, 100 Wn. App. at 522. The facts in this case are distinguishable.

Robinson neither pleaded guilty nor affirmatively asserted his standard range in a presentence report. During sentencing, however, the prosecutor indicated to the trial court that the parties agreed to a standard sentencing range. Defense counsel responded with a recommendation that the trial court sentence Robinson at "the bottom of the [standard] range." RP (Oct. 30, 2007) at 10. Defense counsel never argued that Robinson's convictions encompassed the same criminal conduct or that the trial court's offender score calculation was incorrect. Therefore, we find that Robinson failed to preserve this issue for review.[7]

Robinson argues that, should we find that defense counsel waived this issue, we should also find that he was denied effective assistance of counsel. While it is possible that Robinson's offenses could have encompassed the "same criminal conduct" for purposes of his offender score, RCW 9.94A.589(1)(a), because defense counsel did not raise the issue below, we are reluctant to address the merits of Robinson's claim at this juncture. "If a defendant wishes to raise issues on appeal [concerning ineffective assistance of counsel] that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal." *State v. Burke*, 132 Wn. App. 415, 419, 132 P.3d 1095 (2006) (quoting *State v. McFarland*, 127 Wn.2d at 335). Thus, Robinson is not precluded from filing a personal restraint petition with a developed record attempting to establish that his first degree theft and theft of a firearm convictions encompassed the same criminal conduct and that defense counsel's failure to object was objectively unreasonable. Only then will

[7] *See also Goodwin*, 146 Wn.2d 861 (noted that failure to identify a factual dispute for the court's resolution and to request an exercise of the court's discretion waives one's challenge to his offender score); *State v. Wilson*, 117 Wn. App. 1, 75 P.3d 573 (2003) (held that defendant waived challenge to calculation of offender score by failing to raise issue below).

we be able to accurately assess whether defense counsel's performance was deficient in this case.

VI. SAG Issues

Finally, Robinson raises several issues in his SAG, some of which mirror those raised in his opening brief.

A. Probable Cause

First, Robinson argues that Doughty did not have probable cause to stop the vehicle in which he was a passenger. A police officer may properly stop an automobile if he has probable cause to believe that a traffic violation has occurred. *State v. Chelly*, 94 Wn. App. 254, 259, 970 P.2d 376 (1999). Robinson contends that Doughty based his stop on unverified third-party statements that the vehicle was stolen. The record reflects, however, that Doughty observed the vehicle commit multiple traffic infractions before these statements were even made. At trial, Doughty testified that he observed the vehicle run through an intersection, "essentially sideways breaking traction," at approximately 80 miles per hour. RP (Oct. 15 & 16, 2007) at 29. Doughty observed that the car was "what most people would consider out of control." RP (Oct. 15 & 16, 2007) at 32. He then saw the vehicle travel into an oncoming lane and proceed through an intersection without stopping or yielding to other vehicles. Therefore, he had probable cause to stop the vehicle.[8]

B. Pretextual Stop

Robinson next argues that Doughty's stop of the vehicle was pretextual and therefore violated his constitutional rights. An officer engages in a pretextual traffic stop when he stops a citizen, not to enforce the traffic code, but to circumvent the warrant requirement and to investigate some other matter. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). When determining whether a given stop is pretextual, we consider all circumstances, including both the officer's subjective intent of the officer as well as the objective reasonableness of the

[8] Additionally, Robinson likely waived this issue under RAP 2.5(a) because he did not move to suppress under CrR 3.6.

officer's behavior. *Ladson*, 138 Wn.2d at 358-59 (citing *State v. Angelos*, 86 Wn. App. 253, 256, 936 P.2d 52 (1997)). The record more than adequately demonstrates that Doughty's decision to stop the vehicle was objectively reasonable. Robinson has failed to demonstrate that Doughty's justification for the stop was pretextual.[9]

C. Ineffective Assistance of Counsel

Robinson argues that he was denied effective assistance of counsel because defense counsel (1) never requested a CrR 3.5 or CrR 3.6 hearing; (2) never investigated Clevenger's version of events; (3) refused to contact his alibi witnesses; (4) moved to withdraw from representation; and (5) failed to object to jury instruction 9. Again, we disagree. With respect to Robinson's argument that defense counsel failed to investigate or contact alibi witnesses, we will not consider matters not in the record. RAP 9.2(b). The record indicates that counsel prepared extensively for trial. As for his arguments regarding counsel's failure to move under either CrRs 3.5 or 3.6, Robinson has failed to demonstrate that counsel performed deficiently by making this decision. The traffic stop was based on probable cause and was not pretextual. Robinson does not argue that his statements were involuntary; rather, he argues that he never made them. Failure to hold a CrR 3.5 hearing does not require reversal if there is no genuine issue as to voluntariness. *State v. Summers*, 52 Wn. App. 767, 774 n.7, 764 P.2d 250 (1988). Furthermore, that defense counsel moved to withdraw from representation does not establish deficient performance. Finally, defense counsel's decision to withhold objection to jury instruction 9 was not deficient. Jury instruction 9 provided:

You may give such weight and credibility to any alleged out-of-court statements of

[9] Again, Robinson likely waived this issue under RAP 2.5(a).

> the defendant as you see fit, taking into consideration the surrounding circumstances[.]

Clerk's Papers (CP) at 49. The jury instruction properly stated the law and an objection would have undoubtedly emphasized Robinson's alleged out-of-court statements. Thus, counsel's decision can easily be characterized as a legitimate trial strategy or tactics.

D. Motion to Withdraw

Robinson argues that the trial court abused its discretion by denying defense counsel's motion to withdraw. CrR 3.1(e) provides that after a criminal case has been set for trial, an attorney shall not be allowed to withdraw except for good cause and sufficient reasons. Granting or denying counsel's motion to withdraw from representation rests within the trial court's discretion. *State v. Bird*, 31 Wn.2d 777, 783, 198 P.2d 978 (1948). After questioning both defense counsel and Robinson extensively, and emphasizing that trial was scheduled the next day, the trial court stated, "I don't think there's good cause for granting your request, and I'm going to deny it." RP (Oct. 12, 2007) at 14. In light of the timing of counsel's request and the preparation that had already place, Robinson has failed to show why the trial court abused its discretion by making this decision.

E. Due Process

Robinson next argues that his due process rights were violated when the trial court failed to conduct either a CrR 3.5 or a CrR 3.6 hearing before trial. Before introducing a defendant's statement, a trial court must hold a hearing to determine whether the statement was voluntary. CrR 3.5 Failure to hold a hearing, however, does not render a statement inadmissible where the record indicates there is no question that it was freely made. *State v. Kidd*, 36 Wn. App. 503,

509, 674 P.2d 674 (1983) (citing *State v. Harris*, 14 Wn. App. 414, 422, 542 P.2d 122 (1975)). The record here is unclear as to whether the parties discussed holding a pretrial CrR 3.5 hearing; however, nothing in the record suggests that Robinson made statements under duress, coercion, or inducement of any kind. During trial, Robinson did not claim that his statements to Doughty and Anderson were involuntary. Rather, he denied ever making them. CrR 3.6 governs suppression hearings. "The court shall determine whether an evidentiary hearing is required based upon the moving papers." CrR 3.6(a). Defense counsel did not move to suppress evidence before trial. The evidence at trial showed that the traffic stop and arrest were proper. That the trial court here failed to conduct a hearing on its own initiative is insufficient grounds for a due process claim.

F. First Degree Unlawful Possession of a Firearm

Robinson argues that insufficient evidence supports his first degree unlawful possession of a firearm conviction. Under RCW 9.41.040(1)(a), a person is guilty of first degree unlawful possession of a firearm if he owns, has in his possession, or has in his control any firearm after having previously been convicted of any serious offense as defined in chapter 9.41 RCW. Robinson stipulated to pleading guilty to second degree burglary in 2006. Second degree burglary is a serious offense under RCW 9.41.010(12)(a). In its second amended information, the State charged Robinson with, "as principal or accomplice," knowingly having in his possession a firearm after having previously been convicted of a serious offense, second degree burglary. CP at 29. Robinson does not argue that he was not previously convicted of a serious offense. Rather, he argues that there is no evidence that he "knew the firearm was in the vehicle." SAG at

26.

In this case, there is sufficient evidence that Robinson possessed the firearm. At trial, two officers testified that Robinson admitted to stealing the gun. Furthermore, Clevenger testified that Robinson admitted to having handled the gun at one point. During a vehicle search, Doughty discovered a cell phone box directly behind the vehicle's passenger seat. In the box, Doughty found a fully loaded handgun wrapped in cloth. Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that Robinson possessed the firearm after having been convicted of a serious offense.

G. Jury Instruction 9

Robinson next argues that the trial court abused its discretion by entering jury instruction 9 without first holding a CrR 3.5 hearing. We review a trial court's choice of jury instruction for abuse of discretion. *State v. Montgomery*, 163 Wn.2d 577, 602-03, 183 P.3d 267 (2008) (citing *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997)). As previously noted, this jury instruction is a correct statement of the law. Furthermore, the trial court was not required to hold a CrR 3.5 hearing before trial, as the voluntariness of Robinson's statements was never questioned.

H. Unlawful Search and Seizure

Robinson argues that Doughty performed an unlawful search of the vehicle in which he was a passenger. A warrantless search is not invalid under the Fourth Amendment if it is made incident to a lawful arrest. *State v. White*, 129 Wn.2d 105, 112, 915 P.2d 1099 (1996). In this case, Doughty immediately arrested Smith for reckless driving. Therefore, his search of the vehicle's

passenger compartment was made incident to arrest and is therefore valid. The officers conducted the subsequent search of the vehicle's trunk under a valid search warrant.

I. Cumulative Error

Finally, Robinson argues that "the combined effect of the trial court errors requires reversal." SAG at 37. The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. *State v. Hodges*, 118 Wn. App. 668, 673, 77 P.3d 375 (2003). Instead, the doctrine is implicated when the combined errors effectively denied the defendant a fair trial. *Hodges*, 118 Wn. App. at 673-74. The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). Robinson has failed to meet this burden.

We reverse Robinson's unlawful possession of methamphetamine while armed with a firearm conviction and remand for resentencing, and we affirm his remaining convictions

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, A.C.J.

I concur:

Houghton, J.

Quinn-Brintnall, J. (dissenting in part, concurring in part) — I agree with the majority on the remaining issues but respectfully dissent from the majority's conclusion that insufficient evidence supports Michael Robinson's conviction for unlawful possession of methamphetamine while armed with a firearm. In my opinion, sufficient evidence supports the jury's finding that Robinson was an accomplice to that crime.

In reviewing the sufficiency of evidence, we must view all evidence in the light most favorable to the State and determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). Credibility issues are solely reserved for the trier of fact, who has an opportunity to observe the witnesses as they testify and is in the best position to evaluate the reliability of the testimony. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A person commits unlawful possession of a controlled substance if he or she (1) possesses (2) a controlled substance (3) without a valid prescription. RCW 69.50.4013(1). Methamphetamine is a controlled substance and there was no evidence that a doctor prescribed methamphetamine to Robinson. RCW 69.50.401(2)(b). Thus, the only question was possession and possession need not be exclusive. *State v. Summers*, 107 Wn. App. 373, 384, 28 P.3d 780, 43 P.3d 526 (2001). A person is legally accountable for the conduct of another person if he is an accomplice of another person in the crime's commission. RCW 9A.08.020(2)(c). A person is an accomplice if "[w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a). Applying

the law to the record here reveals that sufficient evidence supports the jury's verdict finding Robinson, as Daniel Smith's accomplice, guilty of possession of methamphetamine while armed with a firearm.

At trial, Robinson asserted an alibi defense to the burglary charge. But taken in a light most favorable to the jury's verdict, the record shows that Robinson admitted to Detective Doug Clevenger that he had been with Smith for a couple of days and was with him during the burglary. The burglary had occurred the day before the two were apprehended trying to elude the police. During Clevenger's interview, Robinson listed the items the two had taken during the burglary, admitted handling the gun, said he knew where the stolen safe was located, and offered to help Clevenger recover the safe. When Clevenger told Robinson that a drug dog was going to be used to search the car in which Smith and Robinson had been riding, Robinson told Clevenger that Smith was "a cook," or methamphetamine manufacturer. Robinson also said that Smith had expressed concern about the methamphetamine lab in the car's trunk when Trooper Tony Doughty pulled them over.

Detective Clevenger thought that Robinson was under the influence of methamphetamine when he was arrested and a search of the car's interior revealed a pair of pants that contained a cellular phone and a glass methamphetamine pipe. Police found a fully loaded gun wrapped in a towel inside a cell phone box. Robinson admitted the pants belonged to him and that he had smoked methamphetamine and marijuana with Smith on the day they were arrested.

The majority asserts that the evidence is insufficient to prove that Robinson constructively or actually possessed the methamphetamine lab located in the trunk of Smith's

car. But possession need not be exclusive[10] and the State did not have to prove that Robinson possessed the methamphetamine lab, only that he was an accomplice of someone who possessed it. Here, the evidence showed that Smith and Robinson committed burglary and theft together, each had a loaded handgun in the car behind the seat in which they were sitting, had been riding in the vehicle which contained a methamphetamine lab in the trunk, and had smoked methamphetamine and marijuana together on the day they were arrested. Viewing this evidence and reasonable inferences from it in the light most favorable to the jury's verdict, as we must,[11] I would hold that the evidence is sufficient as a matter of law to support the jury's finding that Robinson knowingly encouraged, if not requested, Smith to possess (and manufacture) methamphetamine so that they could continue smoking methamphetamine and marijuana together. Accordingly, I would affirm the jury verdicts on all counts.

QUINN-BRINTNALL, J.

[10] *Summers*, 107 Wn. App. at 384.

[11] *Green*, 94 Wn.2d at 220-22.